No. 12,076

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAY BERG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.

Judicial Statement.

The offense in this case was charged in the information pursuant to the provisions of Title 49, Section 20(7)(b), of the United States Code. The District Court had jurisdiction of the cause under said Title 49, Section 20(7)(b) and Title 28, Section 28 of the United States Code, in effect at that time, which conferred on the District Courts original jurisdiction "of all crimes and offenses cognizable under the authority of the United States."

The offenses charged were committed in the City of San Diego, State of California. On April 28, 1947, the appellant appeared before the District Court for the Southern Division of the Southern District of California, for arraignment and plea. Judgment was entered on May 1, 1947.

Thereafter, under date of April 23, 1948, the appellant *in propria persona* filed a motion to correct the judgment and sentence. By order of the District Court, pur-

suant to a Waiver of Venue and Petition by appellant, the matter was transferred from the Southern Division to the Central Division of the Southern District of California. On October 14, 1948, an order was entered by the District Court denying the said motion. Notice of appeal was filed on October 6, 1948, and an Amended Notice of Appeal was filed on October 21, 1948.

This Court has jurisdiction under the provisions of Title 28, Section 1291 of the United States Code.

II.

Statute Involved.

Section 20(7)(b) of Title 49 provides:

> "Any person who shall knowingly and willfully make, cause to be made, or participate in the making of, any false entry in any annual or other report required under this section to be filed, or in the accounts of any book of accounts or in any records or memoranda kept by a carrier, or required under this section to be kept by a lessor or other person, or who shall knowingly and willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such accounts, records, or memoranda, or who shall knowingly and willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, lessor, or person, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, or shall knowingly or willfully file with the Commission any false report or other document, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in

any court of the United States of competent jurisdiction to a fine of not more than five thousand dollars or imprisonment for not more than two years, or both such fine and imprisonment: *Provided,* That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, correspondence, or documents or such carriers, lessors, or other persons as may, after a reasonable time, be destroyed, and prescribing the length of time the same shall be preserved."

III.

Questions Involved in the Appeal.

Appellant is appearing *in propria persona.* It is difficult to determine from his brief exactly all of the points he is attempting to make. It appears to the writer of this brief that the questions involved in the appeal are:

(1) Is the defense of double jeopardy available to the appellant?

(2) Does the information, which contains seven counts, in fact plead one offense, or does it plead separate offenses subject to consecutive penalties.[1]

(3) Does each of the counts of the information allege a public offense?

(4) Did the Court impose an excessive penalty?

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[1]Appellant was sentenced to two years' imprisonment on Counts 1, 2, 3, and 4, each of such terms to run consecutively to the other. Upon Count 5 he was sentenced to a two-year term to run concurrently with Count 1. Upon Count 6 he was sentenced to a two-year term to run concurrently with Count 2. Upon Count 7 he was sentenced to a two-year term to be served at the expiration of sentence on Count 4. The service of this sentence as to Count 7 was suspended and it was ordered that appellant be placed upon probation, the period of probation to commence upon expiration of the sentence to be served as the penalty for Count 4.

IV.

Appellant Has Not Been Placed in Double Jeopardy.

It is true as asserted on pages 1 and 2 of appellant's brief that he entered pleas of guilty in the Superior Court of the State of California in and for the County of San Diego, to three counts of grand theft. The money stolen and involved in the three thefts for which he was prosecuted in the State Court was in each instance money the theft of which was concealed by the false entries pleaded in the information in this case.

It appears that appellant may be asserting that he has been placed in "double jeopardy" because of the prosecution by both State and Federal Governments for the same act and series of acts. However, it is well established that the same act, or series of acts, may constitute an offense against both the State and Federal Governments and draw to its commission the penalties set forth by each as appropriate punishment.[2]

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[2]Assuming, for discussion, that it was the same act here which was the basis of both State and Federal prosecutions, this objection does not raise the question of jurisdiction of the Court as suggested by appellant, but is a personal privilege which can be waived. *Brady v. U. S.*, 24 F. 2d 399 (C. C. A. 8), 1928. It appears that the appellant herein waived the privilege, if any, by his pleas of guilty to all counts in the information and his failure to raise the question at that time.

Even so, in *U. S. v. Lanza,* 260 U. S. 377, the Court discussed this matter fully and stated:

> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal Government, *Barron v. Baltimore*, 7 Pet. 243, and the double jeopardy therein forbidden is a second prosecution under au-

V.

Each of the Counts of the Information Charged a Separate and Distinct Offense.

The appellant alleges that each of the seven counts of the information with which he was charged was predicated upon one typewritten report of cash items and there being but one report, he could be charged with but one count, and that the Court committed error in sentencing appellant upon more than one count. It appears that appellant is including in his brief material in regard to office procedure which cannot be considered by this Court on appeal as it is not supported by the record. Since appellant pleaded guilty to all counts in the information, the Court

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thority of the Federal Government after a first trial for the same offense under the same authority."

The Court went on to quote with approval language used in *Southern Railway Company v. Railroad Commission of Indiana,* at page 445:

> "In support of this position numerous cases are cited, which like *Cross v. North Carolina,* 132 U. S. 131, hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly establisehd."

The Court concluded its opinion by stating that:

> "But it is not for us to discuss the wisdom of legislation, it is enough for us to hold that, in the absence of special provision by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts."

See also *Hudspeth v. Melville,* 127 F. 2d 373.

It appears that Congress has made no provision to bar prosecution by the Federal Courts for the acts involved herein after punishment by the State for a violation of state law arising out of the same acts.

did not admit evidence as to the details of the crimes committed.

See *Morris v. District of Columbia,* 124 F. 2d 284 (1941), which holds that extra-record evidence referred to in the briefs will not be considered on appeal.

The appellant again has not cited any case construing Title 49, U. S. C. Sec. 20(7)(b), the statute under which he was indicted. In fact, there does not appear to be any reported case dealing with this point under the statute. However, the provisions of Title 12, U. S. C. 592, are so similar to those of the statute involved in this case that the analogy is directly in point.

The Circuit Court of Appeals for this circuit in *Bower v. United States,* 296 Fed. 694, held as follows (Cert. Den. in 266 U. S. 601):

> "The statute prohibits the making of any false entry, not the making of a false report, and each such entry constitutes a separate and distinct crime, even though the several entries are made on the same day and contained in the same statement or report."

In *Morse v. United States,* 174 Fed. 539, the Court, at page 552, said:

> "Every entry, therefore, in the books and documents, which asserted that on the day named Miss Wilson borrowed the sum named from the bank, and every entry which undertook to enumerate the property belonging to the bank, and omitted the shares of this stock bought on that day, is a false entry, because it represented as an actual occurrence one which did not exist, or was false in a material part."

United States v. Adams, 281 U. S. 202, cited by the defendant can be distinguished from the present case. In the *Adams* case, each of the entries, though in different books, related to the same transaction. In the instant case six of the entries were made in the same report, each entry relating to a different transaction, and the seventh entry was placed in a different portion of the records of the carrier and related to a different matter. In the *Adams* case at page 204, the Court said:

> "The two entries and reference to the *same transactions,* were based upon the same draft and were the related means of accomplishing a single fraud * * *. But we think that it cannot have been contemplated that the mere multiplication of entries all to the same point and with a single intent should multiply the punishment in *proportion to the complexity of the bookkeeping.*" (Italics supplied.)

United States v. Dalby, 289 U. S. 224, which held that the crime of making false entries by a national bank officer with intent to defraud, includes any entry on the bank's books which is made to represent what is not true with intent either to deceive its officers or to defraud the association. To the same general effect are *Agnew v. United States,* 165 U. S. 36; *United States v. Wilson,* 176 Fed. 806, and *United States v. Mulloney,* 5 Fed. Supp. 77.

In *Bozel v. United States,* 139 F. 2d 153, an analogous situation is found. The Court stated at page 155:

> "The test for determining whether the offenses charged in one or more counts of an indictment are identical is whether the facts alleged in one, if of-

fered in support of the other would sustain a conviction. * * * Where one count requires proof of a fact which the other does not, the offenses charged are not identical."

The Court went on to say at page 156:

"*The proof of the mailing of the letter to the corporation named in the first count would not sustain a conviction on the second count,* and vice versa the mailing of the letter to the corporation named in the second count would not sustain a conviction on the first count. The gist of the offense under the statute in question is the mailing of a letter in the execution of the scheme to defraud. The mailing and the letter itself constitute the *corpus delicti.* The statute forbids not the general use of the post office for the purpose of carrying out a fraudulent scheme or device, but the depositing in the post office of a letter or the removal of a letter from the post office in furtherance of a fraudulent scheme. Each letter so removed and each letter so deposited is a separate and distinct violation of the statute. * * *". (Italics supplied.)

Appellant cites on the same proposition of law *Krench v. United States,* 42 F. 2d 354, in which the Circuit Court held:

"* * * although it is competent for Congress to create separate and distinct offenses growing out of the same transaction, where it is necessary in proving one offense to prove every essential element of another growing out of the same act, a conviction of the former is a bar to a prosecution for the latter * * *."

In the case involved herein proof of the writing of one entry relating to a certain transaction could not be used to prove the writing of another entry relating to a different transaction.

Appellant further cited *Munson v. McClaughry,* 198 Fed. 72, in support of his contentions. However, in *Hostetter v. United States,* 16 F. 2d 921, at page 923, the Court stated:

> "* * * the United States Supreme Court, in the case of *Morgan v. Devine,* 237 U. S. 632, at page 640, *et seq,* disapproved the case of *Munson v. McClaughry,* and we think both the McClaughry cases in effect overruled."

In *Morgan v. Devine, 237* U. S. 632, the United States Supreme Court stated, at page 640:

> "But the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress."

Appellant further contends that the cash items statement is "nothing more than a memoranda written on an ordinary piece of plain white paper which supports the figure as entered on the 'company monthly balance sheet, passenger account.'" However, in *Kennedy v. United States,* 275 Fed. 182, C. C. A. 4th, 1931, memoranda kept by the car clerk of a railroad company and devised by him as a part of the system of his office were held to be records or memoranda of the carrier.

VI.

Each of the Counts of the Information Alleges a Public Offense.

Appellant is attempting to secure a *de novo* consideration of matters which were not urged upon the trial court and which are not supported in any way by the record. He states in substance that the statute under which he was indicted was enacted to protect the shipper and traveller and since no shipper or traveller suffered any loss as a result of his peculation, there was no violation of the statute by appellant. However, as stated before, the appellant entered pleas of guilty to the charges in the information and therefore there is nothing in the record before this Court supporting the facts set forth by appellant in his brief as to whether or not (1) the Commerce Commission would have received any complaint from any travellers or shippers, (2) no traveler lost any service by the peculations, (3) all services were paid for at the tariff rate as set by the Interstate Commerce Commission (4) proper entries were made and recorded as to the amount paid for the service for each traveller and shipper. It is true that the appellant here is proceeding in this appeal in *forma pauperis* and therefore should be extended every consideration. However, the appellant cannot expect this Court to consider matters alleged in his brief but not apparent in the record.

Morris v. District of Columbia, supra;
Beach v. U. S., 149 F. 2d 837 (1945).

Further, the very words quoted by appellant in support of his contention from the *U. S. v. Fruit Growers Express Co.*, 279 U. S. 363, reveal that "the general object

of the statute was to require that common carriers should keep reliable records of the receipt and expenditures of and for each shipment which was the subject of transportation." Although the Act may have been intended to be an *ultimate* protection for the shippers, the general object of the statute was a requirement that common carriers should keep reliable records.

In *Kennedy v. U. S., supra,* at page 183, the Court stated:

> "The statute evidently was framed to accomplish two distinct purposes: First, that all accounts, records, and memoranda of the carrier, whether prescribed by the Commission or not, should be true and correct; second, to secure uniformity and prevent secret dealing, that the accounts, records, and memoranda prescribed by the Commission should be used exclusively."

This contention does not raise a question of jurisdiction as in *Knewel v. Egan,* 268 U. S. 442, at 446, the Court stated as follows:

> "It is fundamental that a court upo nwhich is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved."

This excerpt was quoted with approval in *Buie v. King,* 137 F. 2d 495, at 500, C. C. A. 8, 1943.

Further, a motion for correction of a sentence may not be resorted to for the correction of errors of law which do not vitiate the judgment.

Bozel v. U. S., supra.

VII.

This Court Does Not Have Power to Modify the Sentences Imposed.

Appellant seeks to obtain a review by this Court of the penalties which were imposed. He does not contend that the penalties imposed are greater than those permitted by statute but that the penalties are unduly severe and that the court should not have considered the amount of the money involved in the peculations.

In *U. S. v. Minuse,* 142 F. 2d 388, at 390, C. C. A. 2, 1944, the appellants objected that the sentences imposed were unduly harsh. The court held that where the sentences imposed were permitted by statute, the Circuit Court of Appeals could not review the sentences on this ground.

Conclusion.

It is respectfully submitted that the appeal is without merit and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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